

#L-3046

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

## **TENTATIVE RECOMMENDATION**

relating to

### **Recognition of Agent's Authority Under Statutory Form Power of Attorney**

**September 1990**

*This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.*

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN OCTOBER 31, 1990.**

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

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**Letter of Transmittal**

The Uniform Statutory Form Power of Attorney Act was enacted on Commission recommendation in the 1990 legislative session. See Civ. Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. 986. This tentative recommendation would make the statutory form more effective by making clear that a third person may be compelled to honor the agent's authority under the statutory form to the same extent as the principal could compel the third person to act. A third person who acts unreasonably in refusing to honor the agent's authority under the statutory form would be liable for attorney's fees in an action to compel acceptance. The tentative recommendation would also protect third persons whose refusal is required by a state or federal statute or regulation or by a contract between the third person and the principal. This study has been made pursuant to Resolution Chapter 37 of the Statutes of 1980.



## RECOMMENDATION

The Uniform Statutory Form Power of Attorney Act was enacted in 1990 to provide a simple, readily understood, and widely usable power of attorney form.<sup>1</sup> In order to fully accomplish its purposes, the statutory form needs to be accepted by third persons with whom the agent desires to transact business on behalf of the principal. Judging from past experience with powers of attorney prepared by attorneys and with statutory and nonstatutory forms, the intentions of persons who believe they have put their affairs in order, consistent with the applicable law, have been frustrated by the unwillingness of some third persons to honor a power of attorney and accept the authority of the agent under a power of attorney.<sup>2</sup> In many cases, this reluctance may simply be a bureaucratic reaction to the variety of powers of attorney that the particular business or institution may encounter. Some businesses have adopted a general policy of not honoring powers of attorney unless executed on a form approved by the business itself. In other cases, a third person may genuinely be in doubt as to the authority of the agent even after taking the time to examine the power of attorney.

Existing law attempts to deal with this problem by protecting third persons from liability in specified circumstances. Civil Code Section 2404 protects a third person who relies on the agent's affidavit in support of the

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1. Civ. Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. 986, § 2. This legislation was enacted on recommendation of the Law Revision Commission. See *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990).

2. See, e.g., Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1990 California Durable Power of Attorney Handbook §§ 2.56-2.61 (Cal. Cont. Ed. Bar), discussing policies of banks with regard to accounts, safe deposit boxes, and trusts, and of title companies, insurance companies, and stock transfer agents.

statutory form, the same as any other power of attorney.<sup>3</sup> This affidavit protects a third person from liability for actions undertaken in good faith reliance on the affidavit as to issues of termination and revocation of the power of attorney,<sup>4</sup> but has no compulsory effect on third persons. Similarly, Civil Code Section 2512 protects a third person who acts in good faith reliance on a power of attorney, including a statutory form power of attorney,<sup>5</sup> if the power of attorney is presented by the named agent, appears to be valid on its face, and includes a notary public's acknowledgment.<sup>6</sup> This protection should work well with a statutory form power of attorney presented to a third person by the agent named in the instrument because the statute requires it to be acknowledged before a notary public<sup>7</sup> and the facial validity of the form should be easy to determine. As before, however, these provisions encourage, but do not compel, acceptance by third persons.

The Law Revision Commission recommends adding a provision to the Uniform Statutory Form Power of Attorney Act to address these problems. The proposed legislation would permit the agent under a properly executed statutory form power of attorney to bring an action to compel a third person to accept the agent's authority to the same extent as the principal would be able to compel the third person to act if an

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3. For background on Civil Code Section 2404, see *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980). This general provision in the Uniform Durable Power of Attorney Act (Civ. Code §§ 2400-2407) applies to the Uniform Statutory Form Power of Attorney Act (Civ. Code §§ 2475-2499.5) as provided in Civil Code Section 2480(a).

4. The appropriate extent of the protection afforded by Civil Code Section 2404 for powers of attorney generally is the subject of a pending study by the Law Revision Commission. See also [Tentative] *Recommendation Relating to Recognition of Trustees' Powers* [September 1990], \_\_ Cal. L. Revision Comm'n Reports \_\_ (19\_\_).

5. See Civ. Code § 2480(c).

6. For background on Civil Code Section 2512, see *Recommendation Relating to Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986).

7. See Civ. Code §§ 2475 (form), 2476(c) (acknowledgment of principal's signature).

action were brought on the principal's own behalf.<sup>8</sup> This provision would permit an action against a business, insurance company, financial institution, or other person who holds property of the principal, who owes a debt to the principal, or who owes a duty or performance to the principal. It would not permit the agent to compel a third person to act where the principal could not do so. Thus, a business that could choose not to accept the principal as a customer would be completely free to decline to deal with the agent.

In order to make the proposed remedy effective, the proposed legislation also requires the court to award attorney's fees in an action to compel acceptance of the agent's authority if the court finds that the third person acted unreasonably in refusing to accept the agent's authority.<sup>9</sup> The proposed legislation makes clear, however, that a third person would not be acting unreasonably if the refusal to accept the agent's authority under the power of attorney was authorized or required by a state or federal statute or regulation or by a written provision in a contract or agreement between the third person and the principal. On the other hand, the proposed legislation provides that a third person will not be found to have acted reasonably if the sole reason for refusing to accept the agent's authority was insistence on use of the third person's own form.

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8. This rule is similar to the power of a decedent's successor to enforce delivery or payment of property under the affidavit procedure for collection and transfer of property of a small estate. See Prob. Code § 13105(b). The general power of attorney statute in Minnesota also contains a similar provision. See Minn. Stat. Ann. § 523.20 (West Supp. 1990).

9. This provision is also drawn from the affidavit procedure for collection and transfer of a small estate to a successor. See Prob. Code § 13105(b).

### **PROPOSED LEGISLATION**

**Civil Code § 2480.5 (added). Compelling third person to honor statutory form power of attorney; liability for attorney's fees**

2480.5. (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, to the same extent as the principal would be able to compel the third person to honor the authority of the principal acting in the principal's own behalf.

(b) If an action is brought under this section, the court shall award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority in any of the following circumstances:

(1) If the refusal is authorized or required by a provision of a state or federal statute or regulation.

(2) If the refusal is authorized or required by a written provision of a contract or agreement between the third person and the principal.

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this chapter is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.



**Comment.** Section 2480.5 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Probate Code Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 2404 (affidavit of lack of knowledge of termination of power of attorney).

Subdivision (a) permits an agent to bring an action to compel a third person to honor a statutory form power of attorney to the same extent as the principal, disregarding any legal disability, could bring an action to compel the third person to act. Under this rule, a third person who could not be forced to do business with the principal consequently may not be forced to deal with the agent. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the agent's authority.

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 2512 (protection of person relying in good faith).

Subdivision (c) provides some specific guidelines as to the meaning of the reasonableness rule in subdivision (b) as it relates to the liability for attorney's fees. However, subdivision (d) makes clear that an institution's preference for its own power of attorney form is never a reasonable ground for refusing to accept the authority of an agent under a properly executed and effective statutory form power of attorney.